question of fact for the jury. *Farley* v. *Thalhimer*, 103 Va. 504, 49 S. E. 644. It is, however, the province of the court to decide whether there is sufficient evidence of malice to send the case to the jury, and when there is not, it must direct a nonsuit or verdict for the defendant. See *Neeb* v. *Hope*, 111 Pa. St. 145, 2 Atl. 568.

The holding in the instant case is in line with the overwhelming current of modern authority and seems eminently sound on reason.

MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—"EMPLOYED IN INTERSTATE COMMERCE."—The plaintiff was employed by the defendant as a cook in connection with a gang of bridge carpenters engaged in repairing a bridge used by interstate trains. While preparing a meal in the camp car on a siding, he was injured by a collision. Claiming to have been engaged in interstate commerce, he brought this action under the Federal Employers' Liability Act. *Held,* he is entitled to recover. *Philadelphia, B. & W. R. Co.* v. *Smith*, 39 Sup. Ct. 396.

This important decision has attracted comment, since it clearly broadens the usual interpretation of the Federal Statute. (35 Stat. 65, 8 Comp. Stat. '16, §§ 8657-8665.) The following cases show that the carpenters above were "engaged in interstate commerce," but no previous cases go so far as to include independent sub-assistants in the same category.

Attempts at a true test have been made. To be within the Federal Employers' Liability Act, one need not be directly engaged in interstate train movement, the test being whether one's task is so directly and immediately connected with it as to form a part, or a necessary, though preliminary, incident, thereof. *Cincinnati, N. O. & T. P. R. Co.* v. *Morgan*, 139 Tenn. 27, 201 S. W. 128; *Ohio Valley Elec. R. Co.* v. *Brumfield*, 180 Ky. 743, 203 S. W. 541. And an employee may be "engaged in interstate commerce" while performing a task in connection with a locomotive which has completed an interstate journey and been uncoupled from the train. *Garber* v. *Missouri Pac. R. Co.* (Tex.), 210 S. W. 377. The work must have a real and substantial connection with interstate commerce. *Benson* v. *Bush* (Cal.), 178 Pac. 747; and see valuable references in the same case. The performance of the act in which the employee is engaged must *directly* and *immediately* tend to facilitate movement of interstate commerce, or conversely, its omission must directly interfere with or hinder movement of such commerce. *Morrison* v. *Chicago, M. & St. P. R. Co.*, 103 Wash. 650, 175 Pac. 325. Thus, the work of keeping in repair tracks, roadbed, bridges and other instrumentalities used in interstate commerce, brings those engaged upon it within the meaning of the words, "engaged in interstate commerce." See *Pederson* v. *Delaware, etc., R. Co.*, 229 U. S. 146, Ann. Cas. 1914C, 153.

A gateman employed, by a railroad operating interstate and intrastate trains, to facilitate both kinds of traffic by keeping its tracks clear at a certain point, was killed by an intrastate train while he was backing a horse away from the tracks in order to permit the lowering of a gate. It was held that he was "engaged in interstate commerce." *Southern Pacific Co.* v. *Industrial Accident Commission*, 174 Cal. 8, 161

Pac. 1139. A section man in the service of an interstate carrier, hurt while repairing a track to scales on which cars destined to other states were weighed, was "engaged in interstate commerce." *Dowell* v. *Wabash R. Co.* (Mo.), 190 S. W. 939. So, also, was a section man engaged in assisting a surveyor working on an interstate track. *Southern R. Co.* v. *McGuin*, 153 C. C. A. 447, 240 Fed. 649.

The following cases seem to be in conflict with the instant decision. A carpenter injured while riveting a stovepipe for a stove in a roundhouse used for interstate engines, was not "engaged in interstate commerce." See *Dunn* v. *Missouri Pac. R. Co.* (Mo.), 190 S. W. 966. An employee injured while building a scaffold from which later he was to paint a freight shed, was not engaged in an act so directly connected with interstate commerce as to form a part thereof, even though the shed was, itself, used in interstate commerce. *Killes* v. *Great Northern R. Co.*, 93 Wash. 316, 161 Pac. 69. Nor was a railroad employee who suffered injury while icing interstate cars. *Southern R. Co.* v. *Pitchford*, 253 Fed. 736. An assistant gardener employed, by a railroad company engaged in interstate commerce, to cultivate the yard about a station and gather trash, is not "engaged in interstate commerce." *Galveston H. & S. A. R. Co.* v. *Chojnacky* (Tex.), 163 S. W. 1011. Nor is a teamster who is employed on construction work in a tunnel to be used, when completed, for interstate commerce, but never yet so used. *Jackson* v. *Chicago, M. & St. P. R. Co.*, 210 Fed. 495. See *Illinois Central R. Co.* v. *Behrens*, 233 U. S. 473, Ann. Cas. 1914C, 163 and exhaustive note.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURIES "ARISING OUT OF" EMPLOYMENT—DEATH BY LIGHTNING.—The plaintiff's husband was employed by the defendant to rake leaves in a certain park. While he was so engaged, a violent thunder storm arose and he took shelter with a fellow workman under a nearby tree. No other shelter had been provided. While he was thus sheltered, the tree was struck by lightning, and he was instantly killed. This action was brought by the deceased's widow under a Workmen's Compensation Act. *Held*, she was entitled to compensation. *Chiulla de Luca* v. *Board of Park Commissioners* (Conn.), 107 Atl. 611.

It is well settled, both in England and in this country, that, under the usual Workmen's Compensation Act, compensation is recoverable only for injuries received "in the course of" and "arising out of" the employment. *Fitzgerald* v. *Clarke*, [1908] 2 K. B. 796, 1 B. W. C. C. 197; *In re McNicol*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306. The quoted phrases are found in practically every such statute. See *Wiggins* v. *Industrial Acc. Board*, 54 Mont. 335, 170 Pac. 9, L. R. A. 1918F, 932, Ann. Cas. 1918E, 1164. Hence, to permit a recovery, it is not sufficient that a workmen be injured "in the course of" his employment, but there must be such a causal connection between his employment and the accident that it may be said the injury "arose out of" the employment. The injury from lightning must be a risk reasonably incident to the employment. *Fitzgerald* v. *Clarke, supra.* The situation of the workman must render him more liable than other per-